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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 333

JAMES S. O'ROURKE, JR. and
JOAN O'ROURKE,
Petitioners and
Appellees below,

vs.

HENRY W. SILL and
BERNICE E. SILL,
Respondents and
Appellants below.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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Respondents submit the following by way of correction and supplying omissions in petitioners' petition and supporting brief.

(1) The decision of the Michigan Supreme Court is now officially reported in 352 Mich. 318.

(2) The validity of the lease and occupancy thereunder is admitted. The suit is for unpaid rent for time of occupancy and insurance premiums under the lease. Payment is not pleaded but petitioners (defendants below) seek to avoid liability to plaintiffs under the lease by claiming *constructive eviction* in that water supply was insufficient and that thereby a claimed covenant was breached. Petitioners also plead recoupment claiming damages by reason of (a) insufficient water supply, (b) leaky roof, and

(c) claimed unlawful dispossession. Petitioners asked for directed verdict on the ground of constructive eviction for failure to supply sufficient water (which motion was granted) and thereupon abandoned their claims of recoupment, offering no testimony thereon.

On appeal the Michigan Supreme Court in an exhaustive, well reasoned opinion, reversed, holding that there was no covenant to furnish water, hence there could be no constructive eviction as claimed. No evidence was offered on the recoupment. The Michigan Supreme Court said (352 Mich. at p. 330):

> "On the record before us plaintiffs were, and are, entitled to judgment for the amount of the rental and insurance claimed, together with interest.
>
> "The case is remanded with directions to set aside the judgment, and to enter judgment in accordance herewith."

ARGUMENT

I.

Defendants having abandoned their claims of recoupment and not having pleaded payment as an affirmative defense as required by rule, are not entitled to a trial as to defenses not pleaded as required by rule, nor as to issues abandoned.

Under Michigan law and rules of pleading, payment, in whole or in part, is a substantive affirmative defense, which defendant must specially plead and prove.

> *Smith vs. Smith*, 262 Mich. 60, at p. 61;
> *Smith vs. McCluskey*, 254 Mich. 145, p. 151;
> *Binne vs. Bench*, 302 Mich. 327, at p. 330.
> (Also many other cases cited in said decisions).

Michigan Court Rule 23, expressly so provides. Section 3 of that rule provides:

> "Sec. 3. *The facts constituting any affirmative defense such as payment* • • • (specifying numerous others) • • • in whole or in part • • • must be plainly set forth in the defendant's answer."

Section 5 of the same rule provides:

> "Sec. 5. In actions at law, each separate defense affirmatively pleaded, and each separate cause of action by way of recoupment or set-off *shall be stated in a separate division* of the answer, and *each of such divisions shall be complete in itself and the divisions* numbered consecutively."

That payment was not pleaded was raised in the trial by plaintiffs (respondents here) and the point was not waived. Plaintiffs' counsel specifically stating that "*they* (defendants below) *never claimed payment*". (Transcript 59-60), and testimony was admitted subject to objection that it was not covered by the pleadings. (Transcript p. 50). (See Appendix 46(a), 47(a)-50(a), also transcript pages 47, 48, 49-50, and 59-60).

Defendants' counsel stated that "if the directed verdict is granted, then we will consider as to whether or not to put in any proof as to recoupment" (App. 65(a); Transcript p. 138). (Under Michigan's recoupment statute, where defendants' proven recoupment exceeds plaintiffs' claim, judgment may enter against plaintiff for the excess. (*C. L.* of 1948, Sec. 615.10; *Mich. St. Anno.* 27.835)).

Upon verdict being directed, defendants below did not go on with any proof of recoupment, nor request to do so, and the case there ended. No testimony being offered as to any of the grounds of recoupment, and having elected not to prosecute such claims, or request so to do, defendants have abandoned same. Recoupment is an affirmative defense; the burden of proof and proceeding with the evidence thereof rests upon the defendants.

(*Truax vs. Heartt*, 135 Mich. 150, at p. 154; Vol. 3 *Callaghan's Michigan Pleading & Practice*, Sec. 36.125, pages 465-466, and the many cases there cited).

The course elected by defendants below being abandonment of recoupment, they may not now urge any such right.

Abandonment may be of a cause of action or of a particular proceeding to enforce it, may be express or implied and may arise from acts or conduct or omission. (Vol. 1. *Corpus Juris Secun.*, page 1418, Sec. 138 and cases cited in note 44; Vol. 1 *Michigan Law & Practice Encyclopedia*, Sec. 34, p. 151).

Defendants below made no defense to plaintiffs' claim under the lease and admitted occupancy of the premises thereunder; they did not plead payment as required by Court Rule, but elected to rely solely upon alleged constructive eviction, upon which the Court, after full hearing, held against them; they abandoned their claims of recoupment. There was then no issue for re-trial, and the Court properly reversed and remanded for entry of judgment, which was such order as the case required (*Mich. Court Rule No. 72*, Sec. (g)).

II.

There was no denial of due process or of property or constitutional right.

There can be no question as to power to promulgate and establish rules of pleading and practice. Such power is inherent in Courts, and in Michigan is also given by constitutional and statutory provision. (*Mich. Const.* of 1908, Art. VII, Sec. 5; *Compiled Laws* of 1948, Sec. 691.21; *Mich. St. Ann.*, Sec. 27.34). (*Tomlinson vs. Tomlinson*, 338 Mich. 274, 276).

In judicial proceedings due process of law means according to the regular course of administration of justice, proceeding according to those rules and principles which have been stablished for the protection and enforcement of private rights. (16A *Corpus Juris Secundum*, Sec. 567, pp. 541-544). The function of rules of court is to regulate the practice of the Court, facilitate the transaction of its business, and frame the issues for hearing and determination. There is here nothing in the applicable rules which abrogate or modify any substantive law, and no question arises as to notice or opportunity to be heard and defend. All the issues presented for trial by the pleadings and under the rules were heard and passed upon by the Court, except those voluntarily abandoned by the defendants below, and [redacted] passed upon no issue remains for hearing or determination.

It is respectfully submitted that Writ of Certiorari should be denied.

Respectfully submitted,

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